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STATE OF ALABAMA  
OFFICE OF THE ATTORNEY GENERAL

TROY KING  
ATTORNEY GENERAL

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500 DEXTER AVENUE  
MONTGOMERY, AL 36130  
(334) 242-7300  
WWW.AGO.STATE.AL.US

Honorable Robert L. Childree  
Office of State Comptroller  
100 North Union Street, Suite 220  
Montgomery, Alabama 36130-2602

Court Reporters - Contracts -  
Competitive Bid Law - Exemptions  
- Attorney General

The purchase of court reporting  
services by the Attorney General's  
Office is incapable of being  
competitively bid.

Dear Mr. Childree:

This opinion of the Attorney General is issued in response to your  
request.

QUESTION

In light of the needs of the Attorney  
General's Office for court reporting services and  
the numerous circumstances under which the  
services might be required, do court reporting  
services fit within the "contractual services . . .  
which by their very nature are impossible of  
award by competitive bidding" exception set out  
in section 41-16-21(a) of the Code of Alabama?

FACTS AND ANALYSIS

In a memorandum to your office, this Office stated as follows:

Unlike other agencies that may simply use  
a court reporter for administrative hearings, the  
Attorney General uses the services of court

reporters in multiple types of cases and situations (criminal, civil, administrative proceedings, depositions, etc.). Further, at times we require such court reporting services on short notice and in multiple locations throughout Alabama and sometimes outside the State. The number of court reporters needed, the locations where services are needed, and the types of cases involved are all generally unknown at any given point in time.

Due to the variety of cases that the AG handles, this Office may use different court reporters based on their physical location (proximity to the matter being addressed), experience and knowledge of working with various types of cases, and/or the terminology associated with those different areas. For example, the use of a court reporter that is familiar with medical terminology would be helpful in some instances. The needs in a criminal case and a civil case also vary. In many instances, a court reporter must also appear inside prisons.

Generally, this Office tries to use court reporters located in the area where the deposition will be taken, which avoids the possibility of additional travel costs or appearance fees. If a court reporter located in one area of the State is contracted to provide all the services for the AG's office, the costs may actually be greater than the costs incurred now due to the travel reimbursements involved for that court reporter to travel across the state and/or outside the State.

Another issue to consider is that the Attorney General's Office does not control the hiring of all court reporters that may ultimately furnish a deposition transcript to this office for a fee. This is particularly true in civil litigation. The party to a civil action who is taking the deposition of a party or a witness chooses the court reporter. Thus, if a plaintiff in a civil action

wants to take the deposition of a State defendant or the deposition of a witness, then the plaintiff, not the Attorney General's Office, selects and employs the court reporter, notwithstanding that the Attorney General's Office will most assuredly need to purchase a copy of the transcript of the testimony for use in defending the case. This Office has no power to affect the hiring of the court reporters in those depositions. Thus, in those cases the Attorney General's Office has no control over court reporting services.

Most recently, a case assigned to our Public Corruption and White Collar Crime Unit required the State to be the "appellant" rather than the "appellee". The end result is that our Office has now become the party responsible for paying the court reporter, although we had no input as to which reporter would be utilized. While such instances are rare, they do occur.

In other instances, this Office may use the transcript provided by the official court reporter. Official court reporters are limited by the Alabama Rules of Judicial Administration as to the format of the transcript and the fees to be paid for an original transcript and copies of the transcript. ALA. R. JUD. ADM. 29.

Memorandum from Dan Morris, Chief Deputy Attorney General, Attorney General's Office, to Richard Cater, Chief Counsel, Department of Finance, at 2-3 (February 2, 2009).

The Competitive Bid Law shall not apply to "contractual services and purchases of personal property, which by their very nature are impossible of award by competitive bidding." ALA. CODE § 41-16-21(a) (Supp. 2008). This Office has considered this exemption in the context of a contract to repair a building. Opinion to Honorable S. Richardson Hill, Jr., M.D., President, University of Alabama in Birmingham, dated June 30, 1981, A.G. No. 81-00443. The contract in that opinion was for removal and replacement of all exterior panels on the School of Optometry building at the University of Alabama in Birmingham. The panels were cracked and deteriorated causing significant water leaks. The *Hill*

opinion concluded that the contract did not have to be bid because the extent of the repairs could not be known until the panels were removed, explaining as follows:

In order to have a competitive bid, the owner must be able to prepare plans and specifications that are sufficiently definite to allow potential bidders to prepare bids intelligently and on a comparison basis. See 64 Am Jur 2d, Public Works and Contracts, Section 50 (1972). When this is not possible, competitive bids are not possible.

*Hill* at 3.

This Office has also considered this exemption with regard to aircraft. Opinions to Honorable Paul Bowlin, Director, Alabama Department of Transportation, dated February 28, 2002, A.G. No. 2002-157; Honorable John C. Eagerton, IV, D.P.A., Director, Alabama Department of Aeronautics, dated May 10, 1996, A.G. No. 96-00208; Mr. Harry Mills, Director of the Department of Air Transportation, dated November 17, 1983, A.G. No. 84-00067. The *Mills* opinion concluded that the purchase of supplies and services for the repair and maintenance of state-owned aircraft is not required to be competitively bid. The *Eagerton* opinion extended this holding to the state airport itself. Most recently, this line of opinions was reaffirmed in the *Bowlin* opinion.

These opinions turned on the need for the agency to retain control to ensure compliance with complex federal regulations. The *Mills* opinion explained that it was the agency's "ultimate responsibility to assure the safety of all passengers on the aircraft under your control. This fact alone would require that you be the arbiter of safety standards and procedures for the aircraft within your control." *Mills* at 2. The *Eagerton* opinion elaborated as follows:

The periodic maintenance and repairs, to keep the department-owned airport in safe operating condition and to quickly correct an unsafe condition that may pose a serious threat to airport and public safety, fall within the statutory exception. . . . This is especially true since it is the Aeronautics Department's responsibility to

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see that the operation of this airport meets Federal Aviation Authority requirements.

*Eagerton* at 2.

The Attorney General's Office is a party in many types of legal proceedings in many jurisdictions at any given time. Court orders and the dynamics of the case dictate when and where a court reporter is necessary. These factors change constantly and cannot be ascertained with any definiteness in advance. In addition, a court reporter is not necessarily a jack-of-all-trades for all kinds of cases and the right to use a specific reporter with particular expertise that may be beneficial to the state's case must be reserved to the judgment of the attorney on the case. Moreover, in many instances, this Office is required by law, such as court order, to use the official court reporter, the fees for whom are set by law. Consistent with the above cited opinions, the sheer scope of the legal responsibilities of the Attorney General's Office renders its utilization of court reporting services incapable of competitive bid.

#### CONCLUSION

The purchase of court reporting services by the Attorney General's Office is incapable of being competitively bid.

I hope this opinion answers your question. If this Office can be of further assistance, please contact Ward Beeson of my staff.

Sincerely,

TROY KING  
Attorney General  
By:



BRENDA F. SMITH  
Chief, Opinions Division

TK/GWB

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